Summary of SC94038, *Brentwood Glass Company Inc. v. Pal's Glass Service Inc., Clayco Inc., Cornerstone VI LLC, St. Louis County, National City Bank of the Midwest N.A., Paul M. Macon, UMB Bank N.A. and Victor Zarilli*

Appeal from the St. Louis County circuit court, Judge Richard C. Bresnahan
Argued and submitted September 3, 2014; opinion issued August 23, 2016

Attorneys: Brentwood Glass was represented by Canice Timothy Rice Jr., a private attorney in St. Louis, (314) 241-8000, and Steven M. Cockriel of Cockriel & Christofferson LLC in St. Louis, (314) 821-4200. The defendants in the case were represented by R. Thomas Avery, Robert D. Blitz and Douglas A. Stockenberg of Blitz, Bardgett & Deutsch LC in St. Louis, (314) 863-1500. The county also was represented by Linda S. Wasserman of the county counselor's office in St. Louis, (314) 615-3732.

Overview: A company appeals the portion of a judgment entered against it related to two of its claims: its claim for a mechanic's lien and its public bond claim against a county for allegedly failing to require a public works construction bond. In a per curiam decision that cannot be attributed to any particular judge, the Supreme Court of Missouri affirms the judgment regarding the company's public works construction bond claim, affirms the judgment regarding the mechanic's lien as to the county, reverses the judgment regarding the mechanic's lien as to the developer, affirms the judgment in all other respects and remands (sends back) the case.

All seven judges agree that public policy prevents the company from perfecting its mechanic's lien against the county; that the circuit court erred in finding the company did not provide timely notice of its intent to file a mechanic's lien as to the developer's leasehold interest; and that there is a genuine issue of material fact regarding the last day the company worked on the project and, therefore, whether its lien was timely filed. Four judges agree that the company may have the legal right to perfect its mechanic's lien against the developer's leasehold interest and that a genuine issue of material fact exists regarding whether the company's lien statement provided a just and true account of the demand due, as required by statute. Five judges agree the circuit court did not err in granting judgment as to the company's public bond claim because the relevant statute did not require a bond in this case and because, even if it had, the county has sovereign immunity from such a suit.

In an opinion joined by one other judge, Chief Justice Patricia Breckenridge concurs in part and dissents in part. She would reverse the circuit court's judgment against the company on its public bond claim and its mechanic's lien claim against the developer's leasehold interest, and would remand the case.

In an opinion joined by two other judges, Judge George W. Draper III concurs in part and dissents in part. He would affirm the circuit court's entry of judgment in favor of the defendants on all claims. He would hold that, while the company may have had a legal right to perfect its mechanic's lien against the developer's leasehold interest, the company's failure to provide a

"just and true account" of the demand due in its lien statement, as required by statute, precludes it from doing so.

Facts: St. Louis County adopted a resolution expressing its intent to issue industrial revenue bonds to finance its purchase and development of certain property to be used as a corporation's headquarters. The resolution authorized the corporation and Cornerstone VI LLC to proceed with the "purchase, construction and equipping" of the development, including entering into contracts, and expressed the county's intent to lease the property to the corporation and Cornerstone. The county ultimately passed an ordinance finalizing the comprehensive plan to finance and develop the property. As part of the plan, the county would issue industrial revenue bonds upon which only Cornerstone could draw. The county and Cornerstone executed a contract that contained a lease agreement, required Cornerstone to construct the project on behalf of the county, authorized Cornerstone to act as the county's agent and required Cornerstone to notify the county promptly of any mechanic's liens of which Cornerstone was aware. The project's general contractor, Clayco Inc., subcontracted glass and glazing work with Pal's Glass Service Inc., which sub-subcontracted with Brentwood Glass Company Inc. to perform some of the work. Brentwood Glass ultimately performed extra work not reflected in either the contract price or any change order, and it was not paid for any work performed after January 12, 2007. In July 2007, Brentwood Glass served notice on Cornerstone of its intent to file a mechanic's lien. When it was not paid, Brentwood Glass filed the mechanic's lien, listing Cornerstone as the property owner and claiming more than $1.06 million in unpaid work. Brentwood Glass then sued Cornerstone, Clayco, Pal's, the county, the banks that issued and held the industrial revenue bonds, and the trustees of the deeds of trust securing the bonds. Pal's Glass admitted it owed money and consented to a judgment against it. The remaining defendants filed a motion for summary judgment (judgment on the court filings, without a trial). The circuit court granted their motion. Brentwood Glass appeals the portion of the judgment related to two of its claims: its mechanic's lien against all defendants and its claim against the county for allegedly failing to require a public works construction bond pursuant to section 107.170, RSMo.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Court en banc holds: (1) Brentwood Glass may not perfect its mechanic's lien against the county. Under section 429.010, RSMo, a mechanic's lien may be brought against an owner's property interest, but public policy prohibits attaching a mechanic's lien on buildings, improvements or land owned by a public entity. The county owned the property when Brentwood Glass began working on the building, and the county's contract with Cornerstone provided that any improvements installed in the building immediately became county property. As such, the county is protected.

(2) Brentwood Glass may have the legal right to perfect its mechanic's lien against Cornerstone's leasehold interest. Under section 429.070, RSMo, a mechanic's lien may be brought against a leasehold interest. The county's contract with Cornerstone authorized, under certain circumstances, Cornerstone to assign its leasehold interest without the county's prior written consent. As such, Brentwood Glass had a legal right to perfect a mechanic's lien against Cornerstone's leasehold interest without violating public policy concerns.

(3) The circuit court erred in granting judgment on the basis that Brentwood Glass did not provide timely notice of its mechanic's lien as to Cornerstone's leasehold interest. For a mechanic's lien to be valid, section 429.100, RSMo, requires a party to provide timely notice of its intent to file a mechanic's lien to the property owner or the owner's agent. Brentwood Glass fulfilled this requirement by giving Cornerstone notice of its intent to file a mechanic's lien.

(4) There is a genuine issue of material fact regarding the last day Brentwood Glass worked on the project and whether the lien was timely filed. Section 429.080, RSMo, requires a lien to be filed within six months after the indebtedness accrued. Indebtedness accrues when the last labor is performed or the last material is furnished under an agreement – a date that is a question of fact. The parties dispute that date: the defendants assert Brentwood Glass' work ended January 31, 2007, but Brentwood Glass presents evidence that it performed work through February 2007.

(5) A genuine issue of material fact exists regarding whether Brentwood Glass' lien statement provided a just and true account in compliance with the relevant statute. Section 429.080, RSMo, requires that a lien statement contain "a just and true account" of the demand due after all just credits have been given. The question of whether a lien statement is adequate turns on whether it provides detail and itemization sufficient to enable the owner to investigate and determine the propriety of the lien claim. Brentwood Glass' lien statement itemized all labor and materials it claimed it provided, then deducted the total amount it was paid, concluding it was due more than $1.06 million in unpaid charges. The defendants did not offer any evidence that the lien statement was not sufficient to investigate the propriety of Brentwood Glass' lien claims. Rather, they argued the lien statement was not "a just and true account" of the amount due, but the only evidence they provided that Brentwood Glass included certain work with an intent to defraud was that items may not have been subject to a lien as a matter of law. In contrast, Brentwood Glass offered evidence it included the items by honest mistake or inadvertence without an intent to defraud.

(6) The circuit court did not err in granting judgment as to Brentwood Glass' public bond claim against the county. The relevant statute did not require a bond in this case. Section 107.170.1, RSMo, requires the bond of a contractor that provides construction services under contract to a public entity, not a party that merely arranges for such services to be provided by others. Cornerstone did not provide construction services under the contract and, therefore, is not a contractor under the statute. Even had a bond been required, Brentwood Glass failed to name a party against which it could recover. Brentwood Glass sued only the county and not any individual public official. The county – as a political subdivision – is immune from suit. Unless expressly waived by statute, sovereign immunity bars suit against the government or its subdivisions for the actions of their employees. There is no such waiver in section 107.170.

Opinion concurring in part and dissenting in part by Chief Justice Breckenridge: The author dissents from the Court's holdings as described in paragraph 6, above, but concurs in its other holdings. She would hold the circuit court erred in granting judgment against the company on its public bond claims. She would find the contract between Cornerstone and the county was subject to the requirements of section 107.170. Subsection 2 of this statute references "every contractor," and subsection 1 broadly defines "contractor." While section 170.170 does not define "construction services," its plain and ordinary meaning – as derived from the dictionary –

is building or erecting something that has been commanded or paid for by another. Under the terms of its contract with the county, Cornerstone was obligated to "build or erect" a completed office building "as an agent of" and "on behalf of" the county. As such, it was a "contractor" providing "construction services." Although the author agrees Brentwood Glass sued the wrong party by suing the county rather than an official, board, commission or agency, as required by section 170.170.1(2), she would give Brentwood Glass the opportunity, on remand, to request leave to amend its petition to name different defendants.

Opinion concurring in part and dissenting in part by Judge Draper: The author dissents from the Court's holdings as described in paragraphs 2 and 5, above, but concurs in its other holdings. He would hold that, while Brentwood Glass may have had the legal right to perfect its mechanic's lien against Cornerstone's leasehold interest, Brentwood Glass' failure to comply with section 429.080 precludes it from doing so. Brentwood Glass did not demonstrate substantial compliance with section 429.080 because its lien statement did not contain "a just and true account" of the demand due, thereby vitiating the lien. Uncontested evidence demonstrates that Brentwood Glass included nonlienable items in its lien statement that cannot be excused as matters of inadvertence, computation errors or honest mistakes. Brentwood Glass demanded payment in excess of $1 million above its contract price for "extra" work that was not authorized by its contract or approved by any change order, admits it inflated its hourly rate, and failed to credit Clayco for payments made to Brentwood Glass' unpaid subcontractors and suppliers. Brentwood Glass' inclusion of these items was deliberate, and so its account is not just and true. The author would affirm the circuit court's entry of judgment in favor of the defendants on this claim and all other claims.